

TRANSPORTATION REPORT

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To: The Montana Wheat & Barley Committee

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What Will The New STB Look Like?

As the Senate Commerce Committee and House Transportation and Infrastructure Committee continues to work diligently on reauthorization of the STB, it is becoming clear that rail shippers will see major changes in the regulatory framework with the next couple of years.

This comes after years of work by organizations such as the Alliance for Rail Competition working together with many other organizations on captive shipper education and legislative efforts.

The Congressional approach to dealing with the Captive shippers' problems of lack of competition in the railroad industry will center in this Congress around strengthening and expanding the STB both in function and substance.

Look for Congress to focus on expanding the size of the STB (adding more STB Commissioners), as well as redefining its mission, expanding the role and power of the STB to become far more pro-active in finding solutions to shipper problems that have arisen over the last 30 years with the massive concentration of the railroad industry.

In 1980, when the Staggers Rail Act was passed, the railroad industry was floundering and suffering multiple bankruptcies. One of the main tenants of the Stagger Rail Act was to direct the then ICC (now the Surface Transportation Board) to improve the financial status of the railroad industry while simultaneously protecting the interests of shippers who might or were captive rail customers. Too often, as outline in Congressional, GAO and a host of private studies over the last 20 years, the ICC/STB ruled in favor of the railroads over the interests of rail customers due to focus on railroad financial conditions (a term defined by regulators as revenue inadequacy).

The railroads since 1980 have moved from over 40 Class I railroads serving the country to a situation today where the 4 largest control over 90% of all railroad traffic in the United States. Yet, the regulatory scheme is still structured on the premise put forth in 1980 – namely focus on improvement of rail status at the expense of the rail shipping community. Yes, there have been some improvement in recent decisions by the STB, the changes in cost of capital calculations but the reality is that primary focus continues to be the same focus promulgated in 1980 while the railroads today are operating at virtual record earnings levels (notwithstanding the current economic downturn).

It is apparent that new changes are needed in how the STB approaches and treats the railroad industry and Congress appears to be focused squarely on the issues. It is also apparent that redefining the role of the STB into an advocate for fairness in treatment of those rail customers that, due to the many mergers over the past 30 years, have been left without competitive rail service, is long overdue.

The limits on all small rate case rules which do not provide adequate upper limits for recovery will probably be expanded. New more aggressive transportation policy to guide the STB will probably be accompanied by more robust shipper advocates, and ombudsmanship at the agency.

The key to success of this kind of approach, of course, is the personnel who staff these key positions. A larger STB with a 2009 focus instead of a 1980 focus – will be helpful for shippers and a welcomed change. It is also important that focus of the Congressional efforts will allow those shippers; industries and states who pay the highest freight rates have mechanisms at the STB and via private solutions to pull themselves up by their bootstraps. The upcoming legislation must empower those who are not fortunate enough to be blessed with rail competition – to have mechanisms that work to correct rate and service unfairness and inadequacies.

Recognizing that the railroad industry was given its national franchises to be operated in the public interest – Congress is moving to ensure the public interest component is protected.

The area of most concern to captive shippers is concept of the railroad push to move from traditional accounting to a 'replacement cost' methodology which would have the effect by drastically raising the rail costs of moving over 95% of rail rates from regulated to unregulated status – namely putting them out of reach of the STB. This at a time when the proposals are to expand the STB to allow a more proactive, more shipper oriented regulatory approach?

RAILROAD ANTITRUST LEGISLATION IS GETTING CLOSE TO BECOMING THE LAW OF THE LAND

Part of this item from the Journal of Commerce:

“A bill to strip railroads of a limited antitrust immunity, and therefore open them to more legal pressure from states and shippers, and create more competition in the rail industry, could move to the Senate floor for a vote soon after Congress returns from its upcoming Memorial Day recess, reports the Journal of Commerce.

Senator Kohl’s bill would treat railroads much like other corporations by giving the Justice Department and Federal Trade Commission a role reviewing proposed mergers for anticompetitive issues, instead of leaving them as now solely under the STB’s jurisdiction.

It would also tell district courts that they do not have to give the STB primary jurisdiction over disputes, meaning that more customer or community complaints could go to court instead of first being ruled on by the agency. While the U.S. Court of Appeals can review STB decisions, it rarely overturns them, so having courts rule earlier in the process would weaken the STB’s dominance of rail-shipper service or rate disputes

In the House, a similar bill received a hearing May 19 before an antitrust subcommittee, where Republicans as well as Democrats voiced support for the measure. The House version would have to clear the House Judiciary Committee before proceeding to the House floor for a vote.

Separately, the Consumer Federation of America released a report May 19 that railroads are using their market power to gouge shippers, charging some \$3 billion more annually than they could if there were more competition in the rail industry.

Sen. Herb Kohl (D-Wis.), who sponsored the measure that cleared the Senate Judiciary Committee earlier this year, told the Journal of Commerce he will put the antitrust bill before the full Senate “shortly after the holiday.” Look for movement in the next two weeks.

Some observers thought this measure could be folded into behind-the-scenes negotiations by staff of the Senate Commerce Committee to craft a new rail competition law that would try to resolve many shipper-railroad disputes and give regulators at the Surface Transportation Board new marching orders.”

It is not likely at this juncture that Chairman Rockefeller’s Commerce Committee STB Reauthorization/Captive Shipper bill (described above) will be ready before the full Senate considers the Anti-Trust bill.

The railroad industry is pushing hard to defeat the antitrust measure, even though it has participated in the backstage talks on the separate competition bill.

Passage of the anti-trust bills will be a positive step by Congress to start to bring the railroads in compliance with fair and equitable treatment of all rail shippers and in line with the long standing public interest calls for these federally franchised industries.